Supreme Court, U. S.
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No. 79-1970

In the Supreme Court of the United States

OCTOBER TERM, 1979

VALENTINE R. CICCONE,
PETITIONER,

v.

TEXTRON, INC.,
RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITIONER'S SUPPLEMENTAL MEMORANDUM UNDER RULE 22.6

ROBERT D. PARRILLO
1210 Turks Head Building
Providence, R.I. 02903
(401) 421-2154
Counsel for Petitioner

Of Counsel
A. LAURISTON PARKS
1210 Turks Head Building
Providence, R.I. 02903

HANSON, CURRAN & PARKS
1210 Turks Head Building
Providence, R.I. 02903

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PETITIONER'S SUPPLEMENTAL MEMORANDUM UNDER RULE 22.6

Petitioner in his petition for a writ of certiorari to the United States Court of Appeals for the First Circuit raises the issue of whether an age discrimination charge brought in a deferral state is timely if it is filed less then 300 days but more than 180 days after the act of discrimination.

Subsequent to petitioner filing his petition for a writ of certiorari this Court handed down its decision in *Mohasco Corporation* v. *Silver*, 100 S.Ct. 2486 (1980). Although *Mohasco* dealt with Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (1976) (hereinafter Title VII) rather than the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (1976) (hereinafter ADEA), petitioner submits that *Mohasco* controls this case.

Mohasco discredited the cases relied upon by the First Circuit Court in its opinion challenged here. Specifically, the First Circuit Court relied upon *Olson* v. *Rembrant Printing Co.*, 511 F.2d 1228 (8th Cir. 1975), which held that in order to be entitled to the longer claim-filing period allowed in deferral states, a Title VII claimant must file with either the state or federal agency within 180 days of the act of discrimination. *Mohasco* repudiated *Olson and held that a complaintant in a deferral state is required only to file not more than 300 days after the discriminatory act. 100 S.Ct. at 2490, n.16, 2491, n.19. The statutory provisions regarding filing time requirements should be given their plain meaning, especially where (as in Title VII and ADEA cases) laymen institute the charges. 100 S.Ct. at 2491, n.19.*

While Mohasco and *Olson* dealt with Title VII cases, it was noted in *Mohasco* that the filing requirements of Title VII and the ADEA are similar, 100 S.Ct. at 2490, n.16. Furthermore, when discussing *Olson* this Court cited the case at bar, *id.*, thus clearly indicating that the holding on filing requirements for Title VII cases would be the same in ADEA cases. *See Davis* v. *Calgon Corporation*, No. 79-2606 (3d Cir. August 1, 1980) (attached as Appendix E) A-6—A-7.

In addition to *Mohasco* recent decisions by the United States Court of Appeals for the Third Circuit are significant. On June 10, 1980 that court handed down *Davis* v. *Calgon Corporation*, 22 F.E.P. Cases 1761 (3d Cir. 1980), a case which involved substantially the same facts and the identical issue presented by the case at bar. The Third Circuit Court initially agreed with the First Circuit Court and held that an ADEA claimant in a deferral state must file within 180 and not 300 days of the alleged discriminatory act.

Thereafter, this Court issued its opinion in *Mohasco*. the Third Circuit Court granted a request for reargument and on August 1, 1980, relying upon *Mohasco*, reversed its June 10, 1980 opinion. *Davis* v. *Calgon Corporation, supra.* (Appendix E).

Another development which arose subsequent to the filing of this petition for a writ of certiorari is the case of *Ewald* v. *Great Atlantic & Pacific Tea Company, Inc.*, 620 F.2d 1183 (6th Cir.) *petition for cert. filed* August 4, 1980, No. 80-208. That case, too, is essentially a mirror image of the case at bar. Like this case *Ewald* was returned prior to the issuing of *Mohasco*. Unlike this case, however, there was a strong dissent by Circuit Judge Jones. 620 F.2d at 1189-90. The dissent is similar to this petitioner's argument in that Judge Jones believes that to require an ADEA claimant in a deferral state to file within 180 days is to ignore the plain language of 29 U.S.C. § 626(d) and to rewrite the statute to include filing requirements not declared by Congress.

When the instant petition for writ of certiorari was filed the First Circuit Court and Ninth Circuit Court (*Bean* v. *Crocker National Bank*, 600 F.2d 754 (9th Cir. 1979)) were at odds on the issue presented. At present the First Circuit and Sixth Circuit (*Ewald*) disagree with the Ninth Circuit and Third Circuit (*Davis* v. *Calgon Corporation, supra*) on the question.

As the Third Circuit Court has recognized, the foundation of the opinion of the First Circuit Court has been destroyed by *Mohasco*. For that reason, as well as for the reasons set forth in the petition for writ of certiorari and Judge Jones' dissent, petitioner again respectfully urges this Court to issue its writ of certiorari so that the judgment and decision of the United States Court of Appeals for the First Circuit may be reviewed.

Respectfully submitted

ROBERT D. PARRILLO
1210 Turks Head Building
Providence, R.I. 02903
(401) 421-2154
Counsel for Petitioner

Of Counsel
A. LAURISTON PARKS
1210 Turks Head Building
Providence, R.I. 02903

HANSON, CURRAN & PARKS
1210 Turks Head Building
Providence, R.I. 02903

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2606

LAWRENCE E. DAVIS,

Appellant

v.

CALGON CORPORATION, a corporation

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. Civ. No. 79-0692)

Argued March 19, 1980
Panel Rehearing Granted July 1, 1980
Resubmitted under Third Circuit Rule 12(6)
July 8, 1980
Before: SEITZ, *Chief Judge*, and
WEIS and HIGGINBOTHAM, *Circuit Judges*
(Filed August 1, 1980)

PAUL H. TITUS, ESQ., (Argued)
BERNARD D. MARCUS, ESQ.,
ESTELLE F. COMAY, ESQ.,
TITUS & MARCUS
624 Oliver Building
Pittsburgh, Pa. 15222
Attorneys for Appellant
EDWARD N. STONER II, ESQ., (Argued)
ROBERT E. SHEEDER, ESQ.,
REED, SMITH, SHAW & McCLAY
747 Union Trust Building
Pittsburgh, Pa. 15219
Attorneys for Appellee

OPINION OF THE COURT

Per Curiam:

Plaintiff Lawrence E. Davis appeals from a final order of the district court that granted defendant Calgon Corporation's motion to dismiss. The district court dismissed plaintiff's age discrimination complaint because it found that Plaintiff had not satisfied the preconditions to suit specified in the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* (1976) (ADEA).

I.

Plaintiff's complaint alleges that he was employed as an executive by defendant from 1967 until his employment was terminated on June 30, 1978, at age 55. Plaintiff asserts that his discharge violated the ADEA[1] because it was done in furtherance of a general corporate policy adopted by defendant of demoting and terminating its executives solely on account of age and replacing them with individuals under the age of 40.

On January 29, 1979, 213 days after his discharge, plaintiff filed a complaint alleging age discrimination with the Pennsylvania Human Relations Commission (the PHRC). Ten days later, he filed a charge with the Secretary of Labor (the Secretary).[2] After receiving notice from the PHRC that it had terminated state proceedings and from the Secretary that he had concluded conciliation efforts, plaintiff filed suit in the district court.

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[1] Although plaintiff's complaint also refers to the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* (1976), we do not read his factual recitals to assert an independent cause of action or claim for relief under this statute.

[2] At that time, the ADEA required the plaintiff to file a charge with the Secretary. *See* 29 U.S.C.A. § 626(d) (West 1979 Supp.). Under Reorg. Plan. No. 1 of 1978, 43 Fed. Reg. 19,807 (1978) (effective July 1, 1979), all functions vested in the Secretary under § 626(d) were transferred to the EEOC. Because this case arose prior to the effective date of the reorganization, we will refer only to the Secretary in this opinion.

Defendant moved to dismiss plaintiff's complaint on the ground that plaintiff had not filed his charge with the Secretary within the time limits prescribed in the ADEA, 29 U.S.C.A. § 626(d) (West 1979 Supp.). Section 626(d) provides that such a charge shall be filed:

> (1) within 180 days after the alleged unlawful practice occurred; or
>
> (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Section 633(b) which deals with the relationship between federal and state age discrimination actions, applies to ADEA claims based on alleged unlawful practices occurring in "deferral states." These are states having a law prohibiting age discrimination in employment and establishing a state authority to grant or seek relief from such discrimination.

Plaintiff filed both his state and federal claims after 180 days but before 300 days. Because Pennsylvania is a deferral state, *see Bonham* v. *Dresser Industries, Inc.*, 569 F.2d 187, 194 (3d Cir. 1977), *cert. denied*, 439 U.S. 821 (1978); Pa. Stat. Ann. tit. 43, §§ 955-957 (Purdon 1964 & 1979 Supp.), plaintiff argues that he is entitled to the 300-day period specified in § 626(d)(2) and that therefore his charge of age discrimination was timely filed with the Secretary. The district court disagreed, finding that the 300-day filing period was available only where "timely invocation of the State remedy occurred." The court found that plaintiff's filing with the PHRC was not timely and that a 180-day period for filing with the Secretary applied in this case. Therefore, it concluded that plaintiff's failure to file a charge with the Secretary within 180 days precluded this suit.

The basis of the district court's conclusion that plaintiff's filing with the PHRC was not timely is unclear. The court may have found the filing untimely either because plaintiff did not file with the PHRC within the 90-day state statute of limitations, *see* Pa. Stat. Ann. tit. 43, § 959 (Purdon 1979 Supp.), or because he did not make the state filing within 180 days. We are unable to determine which of these time limits was relied upon by the district court. Therefore, we must consider both of them to determine whether the district court's decision to dismiss plaintiff's complaint was correct.

A.

In *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750 (1979), the Supreme Court held that although the ADEA makes resort to state procedures mandatory for claims arising in deferral states, a plaintiff is not required to commence the state proceedings within the time limits set by state law to preserve his federal remedy. The Court stated that "state procedural defaults cannot foreclose federal relief and that state limitations periods cannot govern the efficacy of the federal remedy." *Id.* at 762. Therefore, plaintiff's failure here to comply with the state statute of limitations cannot bar his ADEA suit and cannot support the district court's decision.

B.

Defendant argues, however, that the extended period for filing a charge with the Secretary provided in § 626(d)(2) applies only when a plaintiff files with the state within the shorter federal period of 180 days and that the district court based its decision on plaintiff's failure to file with the state within this period. It contends that the district court properly granted its motion to dismiss because plaintiff did not file

with the PHRC until more than 180 days after his discharge and, consequently, that plaintiff was not entitled to 300 days to file with the Secretary.[3]

Defendant relies on a number of cases decided under both Title VII and the ADEA that have construed the filing limits for these statutes to require deferral state plaintiffs to file with the state within the 180 day federal period to be entitled to an extended period for filing with the proper federal authority. *See, e.g., Ewald* v. *Great Atlantic & Pacific Tea Co.*, No. 77-1600 (6th Cir. May 9, 1980) (ADEA); *Ciccone* v. *Textron, Inc.* 616 F.2d 1216 (1st Cir.), *petition for cert. filed*, 48 U.S.L.W. 3839 (June 24, 1980) (No. 79-1970) (ADEA); *Olson* v. *Rembrandt Printing Co.*, 511 F.2d 1228 (8th Cir. 1975) (in banc) (Title VII). However, since the present case was argued in this court, the Supreme Court has expressly rejected the reasoning of these cases and adopted a literal reading of the filing provisions of Title VII. *See Mohasco Corp.* v. *Silver*, 48 U.S.L.W. 4851 (June 23, 1980).

Although the precise issue presented in *Mohasco* concerned the meaning of the term "filed" in subsections (c) and (e) of § 706 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (c),(e) (1976), the Court examined *Olson* and its progeny in two footnotes. 48 U.S.L.W. at 4852-53 n.16, 19. It found

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[3] Defendant asserts that two prior decisions of this court control our determination of this issue. *See Holliday* v. *Ketchum, MacLeod & Grove, Inc.*, 584 F.2d 1221 (3d Cir. 1978) (in banc); *Bonham* v. *Dresser Indus., Inc.*, 569 F.2d 187 (3d Cir. 1977), *cert. denied*, 439 U.S. 821 (1978). In *Holliday*, the plaintiff filed with the Secretary 168 days after his discharge. Thus, we were not presented with any question concerning the applicability of the extended filing period. Defendant also relies on a footnote in *Bonham*. *See* 569 F.2d at 192 n.5. We are unsure, however, whether the statement in this footnote survives the Supreme Court's decision in *Evans*, and therefore, we choose not to rely on it in this case.

that the *Olson* court's interpretation of the time limits imposed by § 706(e) was not supported by the statute because "Congress included no express requirement that state proceedings be initiated by any specific date in the portion of [subsection (e)] that relates to time limitations in deferral States." *Id.* at 4853 n.19. The Court concluded by stating that:

> we do not believe that a court should read in a time limitation provision that Congress has not seen fit to include . . . at least when dealing with "a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process."

Id. (quoting *Love* v. *Pullman Co.*, 404 U.S. 522, 527 (1972)).

While *Mohasco* involved the time limitations of Title VII, we find the Supreme Court's statements equally applicable to the ADEA. First, we have recognized that interpretations of similar language in Title VII can provide guidance for interpretation of the ADEA. *See Ricks* v. *Delaware State College*, 605 F.2d 710, 712 (3d Cir. 1979) (applying rule for when time limitations of ADEA begin to run to similar time limits in Title VII), *cert. granted*, 100 S.Ct. 1012 (1980). *See also Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756 (1979).

Moreover, in its discussion rejecting the *Olson* approach, the Court also cited *Ciccone* v. *Textron, Inc.*, *supra*, a case that relied on *Olson* to hold that an ADEA plaintiff must file with the state within 180 days to be entitled to the extended filing period of § 626(d)(2). Finally, the ADEA, like Title VII, is a statutory scheme in which laymen, unassisted by counsel, often initiate the process. *See Oscar Mayer & Co.* v. *Evans*, 441 U.S. at 761.

Nothing in the language of § 626(d)(2) imposes on deferral state plaintiffs a duty to file with the state within

180 days to be entitled to the extended filing period in which to file with the Secretary. Regardless of what our own conclusions would be, we find that the Supreme Court's statements in *Mohasco* control disposition of this issue, and we refuse to "read in a time limitation provision that Congress has not seen fit to include." Therefore, we hold that a plaintiff in a deferral state is entitled to the extended period provided by § 626(d)(2) regardless of whether he has filed a state administrative complaint within 180 days after the alleged discrimination occurred. *Accord, Bean* v. *Crocker National Bank*, 600 F.2d 754 (9th Cir. 1979). Because the plaintiff in this case filed a charge with the Secretary 223 days after his discharge, his filing was timely, and the district court erred in dismissing his complaint.

III.

The order of the district court dismissing plaintiff's complaint will be reversed.